Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-04-12-1995
MAHADEV SHANKAR, ABU MANSOR ALI JJCA AND ABDUL MALEK J
5 OCTOBER 1995

Civil Procedure *— Appeal — Matter not pleaded or put forward in sessions court — Whether party could raise it in High Court*

Civil Procedure *— Pleadings — Striking out — Whether judge was right in striking out the action — Rules of the High Court 1980 O 18 r 19(1)(b), (c) & (d)*

Between October 1985 and March 1986, the appellant bought 85 lots of shares ('the shares') in a company called Pahang Investment Plc ('PI') through two remisiers employed by Nadzri & Ng Securities Sdn Bhd ('the respondent'). The appellant gave the remisiers cheques which were made out in favour of the respondent, totalling RM94,226.15, for the purchase of the shares. The share certificates which were delivered to the appellant carried the name 'Pahang Consolidated Plc', which was the old name of PI. On 14 October 1985, trading in PI shares was suspended by the Kuala Lumpur Stock Exchange ('KLSE'), and the company was delisted on 29 February 1988. According to information received by the appellant from the Malaysian Investors Association ('MIA'), criminal investigations had been launched into the activities of PI because spurious shares had been issued, and that the certificates supplied to him by the respondent were forgeries. According to the respondent, the chairman of the KLSE had issued a press release on 11 April 1988, and it was stated that unless the registrar or the authorities could confirm that the shares were forged shares, the brokers would not be in a position to assist the last buyers to seek original sellers for replacement with good certificates, and he advised the public to wait for the outcome of the police investigation. On 13 November 1989, however, the appellant filed his writ in the sessions court against the respondent and the remisiers. The appellant pleaded breach of contract, negligence, and fraudulent misrepresentation on the part of the respondent and the remisiers. His complaint, inter alia, was that the respondent had received shares which they knew or ought to have known were forgeries. He further alleged that the respondent was vicariously liable for the acts of the remisiers as its employees. The defence of the respondent was that they had no responsibility to ensure the genuineness of the share certificates, and that the party with such responsibility was the registrar of the PI or the Securities Clearing Automated Network System Sdn Bhd ('SCANS'). The respondent later filed an application to strike out the appellant's claim on the ground that it disclosed no cause of action. The sessions court judge dismissed that application with costs. The respondent and its remisiers appealed to the High Court. The judge reversed the

A sessions court judge's decision, and struck out the appellant's action (see [1994] 3 MLJ 691). The judge, in concluding his judgment, said that the appellant could seek remedy from PI under s 63 Companies Act 1965 ('the Act'). Against this decision, the appellant applied for leave to appeal. Leave was granted against the respondent. The issue before the Court of Appeal was whether the judge was right in striking out the appellant's action against the respondent.

Held, allowing the appeal:

(1) The respondent provided no information as to when, where or from whom they acquired the allegedly forged shares which they delivered to the appellant. In their defence, they were not prepared to assert that the shares were genuine. Thus, the question as to whether the shares were genuine or forged was very much a matter for proof at the trial (see pp 246I and 247A).

(2) The High Court judge had assumed that the Pahang Consolidated shares were genuine when such a finding of fact could only be made at the end of trial (see pp 248I and 249A).

(3) O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 would have no application if the disputed facts that were established at the trial would support a cause of action (see p 249B).

(4) Section 63 of the Act was not pleaded or even put forward in the sessions court by the respondent's counsel, and he should not have been permitted to raise it on appeal in the High Court (see p 248F).

(5) Section 63 of the Act will only come into play if it is first shown that offending shares were issued by the board of directors of PI and those shares were invalid by reason of some provision of the Act or other written law or the memorandum and articles of association of the company. However, in this case, there was no such evidence that the shares had in fact been issued by the board of PI. The shares did not carry the signatures of any director or secretary of the company, and neither was the seal of the company attested. Furthermore, the share certificates were issued in the name of Pahang Consolidated, which was not a legal way to refer to the company at that time as that name was changed on 15 October 1984 (see pp 247D and 248D–F).

[Bahasa Malaysia summary

Antara Oktober 1985 dan Mac 1986, perayu telah membeli 85 lot syer ('syer tersebut') dalam suatu syarikat yang bernama Pahang Investment Plc ('PI') melalui dua orang remisier yang digaji oleh Nadzri & Ng Securities Sdn Bhd ('penentang'). Perayu memberi remisiers cek atas nama penentang, yang berjumlah RM94,226.15, untuk pembelian syer tersebut. Sijil syer yang telah dihantar serah

kepada perayu membawa nama 'Pahang Consolidated Plc', yang merupakan nama lama PI. Pada 14 Oktober 1985, perniagaan dalam syer PI telah digantung oleh Bursa Saham Kuala Lumpur ('BSKL'), dan syarikat tersebut telah disingkirkan dari senarai pada 29 Februari 1988. Mengikut maklumat yang diterima oleh perayu dari Persatuan Pelabur Malaysia ('PPM'), siasatan jenayah telah dimulakan terhadap aktiviti PI kerana syer palsu telah dikeluarkan, dan bahawa sijil yang telah diberikan kepadanya adalah palsu. Mengikut penentang, pengerusi BSKL telah mengeluarkan suatu pelepasan akhbar pada 11 April 1988, dan adalah dinyatakan bahawa kecuali pendaftar atau pihak berkuasa yang boleh mengesahkan bahawa syer adalah palsu, broker tidak berada dalam kedudukan untuk menolong pembeli terakhir untuk mencari penjual asal bagi penggantian sijil yang elok, dan beliau menasihati orang awam supaya menanti keputusan siasatan polis. Pada 13 November 1989, walau bagaimanapun, perayu memfailkan writnya dalam mahkamah sesyen terhadap penentang and remisier yang berkenaan. Perayu menyatakan dalam plidingnya, kemungkiran kontrak, kecuaian, dan salah nyata fraud pada pihak penentang dan remisier. Aduannya ialah, antara lain, bahawa penentang telah menerima syer yang mereka tahu atau harus tahu merupakan pemalsuan. Dia seterusnya menyatakan bahawa penentang adalah bertanggungan secara vikarius untuk tindakan remisiers sebagai pekerjanya. Pembelaan penentang ialah bahawa mereka tidak bertanggung jawab untuk memastikan keaslian sijil syer tersebut, dan bahawa pihak yang mempunyai tanggung jawab sedemikian ialah pendaftar PI atau Securities Clearing Automated Network System Sdn Bhd ('SCANS'). Penentang kemudiannya telah memfailkan suatu permohonan untuk membatalkan tuntuan perayu atas alasan bahawa ia tidak mengemukakan kausa tindakan. Hakim mahkamah sesyen menolak permohonan tersebut dengan kos. Penentang dan remisiernya merayu kepada Mahkamah Tinggi. Hakim mangakaskan keputusan hakim mahkamah sesyen, lalu membatalkan tindakan perayu (see [1994] 3 MLJ 691). Beliau mengakhiri penghakimannya dengan mengatakan bahawa perayu boleh memohon remedi daripada PI di bawah s 63 Akta Syarikat 1965 ('Akta tersebut'). Perayu telah memohon kebenaran untuk merayu terhadap keputusan ini. Kebenaran telah diberikan terhadap penentang. Isu yang harus dipertimbangkan oleh Mahkamah Rayuan ialah sama ada hakim adalah betul dalam membatalkan tindakan perayu terhadap penentang.

Diputuskan, membenarkan rayuan itu:

(1) Penentang tidak memberikan apa-apa maklumat tentang bila, di mana, atau dari siapa mereka mendapatkan syer yang dikatakan palsu tersebut yang mereka telah menghantar serah kepada perayu. Dalam pembelaan mereka, mereka tidak sedia untuk menyatakan bahawa syer mereka adalah yang asli. Oleh itu, soalan sama ada syer tersebut adalah asli atau palsu adalah pada dasarnya suatu

perkara yang harus dibuktikan pada pembicaraan (lihat 246I dan 247A).

(2) Hakim Mahkamah Tinggi telah menganggap bahawa syer Pahang Consolidated adalah asli apabila pencarian fakta sedemikian hanya boleh dibuat pada akhir pembicaraan (lihat ms 248I dan 249A).

(3) A18 r 19(1)(b), (c) and (d) Peraturan-Peraturan Mahkamah Tinggi 1980 tidak terpakai jika fakta yang dipertikaikan yang telah dibuktikan pada pembicaraan boleh menyokong suatu kausa tindakan (lihat ms 249B).

(4) Oleh kerana s 63 Akta tersebut tidak dinyatakan dalam pliding ataupun dikemukakan dalam mahkamah sesyen oleh peguam penentang, peguam penentang tidak patut dibenarkan untuk membangkitkannya lagi di rayuan dalam Mahkamah Tinggi (lihat ms 248F).

(5) Seksyen 63 Akta tersebut hanya terpakai jika adalah ditunjukkan, pertama sekali, bahawa syer yang dikatakan palsu itu telah dikeluarkan oleh badan pengarah PI dan bahawa syer tersebut adalah tidak sah akibat beberapa peruntukan Akta atau undang-undang bertulis yang lain atau memorandum dan tataurusan persatuan syarikat. Walau bagaimanapun, dalam kes ini, tidak terdapat keterangan bahawa syer tersebut adalah sesungguhnya dikeluarkan oleh badan pengarah PI. Syer tersebut tidak membawa tandatangan mana-mana pengarah atau setiausaha syarikat, dan mohor syarikat juga tidak diakusaksi. Lagipun, sijil syer adalah dikeluarkan dalam nama Pahang Consolidated, yang bukan merupakan cara yang sah di sisi undang-undang untuk merujuk kepada syarikat tersebut pada masa itu, kerana namanya telah ditukar pada 15 Oktober 1984 (lihat ms 247D dan 248D–F).]

Notes

For cases on striking out, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2640–2648.

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Allen v Gulf Oil Refining Ltd [1981] 1 All ER 353
Dixon v Kennaway & Co [1900] 1 Ch 833
Lamert v Heath (1846) 153 ER 941
Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691
Richards v Naum [1966] 3 All ER 812
Ruben & Anor v Great Fingall Consolidated & Ors [1906] AC 439
South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch 496
Sykt Soon Theam Sdn v H'ng Chye Jin [1975] 1 MLJ 259
Tilling v Whiteman [1980] AC 1
Wenlock v Moloney & Ors [1965] 2 All ER 871

Legislation referred to

Companies Act 1965 s 63
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d), O 19, O 33
Subordinate Court Rules 1980 O 14 r 21(1), (a)

Appeal from: Appeal No 12–12–1993(T) (High Court, Taiping)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.
Balbir Singh (*Palanivel* with him) (*Rashid & Lee*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): Between October 1985 and March 1986, Saw Seng Kee ('the plaintiff') bought 85 lots of shares in a company called Pahang Investment Plc ('PI'). He did so through two remisiers, Ng Kian Chong ('Ng') and Saw Cheng Hoe ('Saw'). They were both employed by Nadzri & Ng Securities Sdn Bhd ('the brokers'). The plaintiff gave Ng and Saw cheques totalling RM94,226.15 for the aforesaid shares. These cheques were made out in favour of the brokers.

On 14 October 1985, trading in PI shares was suspended by the Kuala Lumpur Stock Exchange ('KLSE') which delisted the company on 29 February 1988. According to information received by the plaintiff from the Malaysian Investors Association ('MIA'), criminal investigations had been launched into the activities of PI because spurious shares in PI in excess of 32 million units had been issued, certificates supplied to him by the brokers were forgeries and he had been cheated. MIA advised the plaintiff to get an amicable settlement from his brokers, failing which he should issue a writ. According to the information received by the brokers, the chairman of the KLSE issued a press release on 11 April 1988 that PI had gone into liquidation and that, therefore, shareholders should file their claims with the liquidators. He said that unless the registrar or the authorities could confirm that the shares were forged shares the brokers would not be in a position to assist the last buyers to seek original sellers for replacement with good certificates, and advised the public to await the outcome of the police investigation. In each case, the information received was 'hearsay' and could only become direct evidence when given first hand in a trial.

The plaintiff did not get satisfaction and filed his writ in the Sessions Court at Taiping on 13 November 1989. He sued Ng, Saw and the stockbrokers. From his statement of claim, it is obvious that his action was not just based in contract. He also pleaded negligence and fraudulent misrepresentation on the part of all the defendants. These are causes of action in tort. He alleged that the brokers were vicariously liable for the acts of Ng and Saw as remisiers employed by them. The essence of these allegations in tort was that the shares were forgeries.

A Ng and Saw filed a defence denying liability. So did the brokers who also took out third party proceedings against the KLSE. The defendant got lengthy adjournments on the ground that they needed time to get details from the KLSE. Both the claim and the defences were repeatedly amended, and the date for the hearing of the action was fixed for 2 November 1992.

B At this late stage on 22 October 1992, the brokers filed an application to strike out the plaintiff's claim on the ground that it disclosed no cause of action. The first and second defendants, who had filed their defence on 14 February 1990 and amended their defence on 7 October 1991, also filed an application to strike out the statement of claim on 1 December C 1991.

Numerous adjournments then followed and these applications finally came before the sessions court judge on 26 April 1993 when they were fully argued. The matter was then adjourned to 28 May 1993, when the sessions court judge dismissed the application to strike out the claim with D costs. She also dismissed the application by the brokers to initiate third party proceedings against the KLSE.

The defendants appealed to the High Court at Taiping. The judge here reversed the sessions court judge and struck out the action. Against this decision, the plaintiff applied for leave to appeal. For reasons which E counsel were unable to enlighten us, the plaintiff was not able to obtain leave against the first and second defendants, Ng and Saw. He did obtain leave against the brokers. The issue now is whether the judge was right in striking out the plaintiff's action against the brokers. We held he was not. We now give our reasons for so doing.

F The brokers' application in the sessions court was based under O 14 r 21(1) of the Subordinate Courts Rules 1980. This rule is in terms identical to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980. The application alleged that:

(i) the statement of claim did not show any cause of action;

G (ii) it was frivolous and vexatious;

(iii) it was an abuse of the process of the court.

Consequently, affidavit evidence was admissible. In this case, it was stated that the application would be supported by the affidavit of Muhammad Nadzri Hamzah. This affidavit was affirmed on 15 October H 1992.

In this affidavit in para 3, he said that he had been advised and verily believed that all the averments in the defence of the brokers were true and that the brokers would rely upon them at the trial. In para 4, he said that the averments in the statement of claim were without foundation, unfair I and did not show a cause of action. In para 5, he said that there was no evidence for the plaintiff to aver that the defendants were involved in a fraud and by reason of that, the claim was defamatory. In para 6, he said that he was advised and verily believed that the claim did not show any

cause of action, was frivolous and vexatious and an abuse of the court process, because at the material time, the brokers had no responsibility to ensure the genuineness of the share certificates and that he believed that the party with such responsibility was the registrar of the PI or the Securities Clearing Automated Network System Sdn Bhd ('SCANS') as all shares whether bought or sold had to be processed through SCANS. He then exhibited a letter from the KLSE dated 26 October 1990. This letter, exh N1, is a reply to a letter from the brokers' solicitors dated 12 October 1990 (not exhibited). All exh N1 says is that the Pahang Investments Plc was suspended from trading in its shares from 14 October 1985, and taken out of the list of the KLSE on 19 February 1988. On 13 November 1992, Encik Muhammad Nadzri Hamzah filed a further affidavit in which he stated that it was clear from the reamended statement of claim that there was no basis for the plaintiff's claim against the third defendant.

Pausing here for a moment, we feel obliged to observe that these affidavits of Encik Muhammad Nadzri Hamzah really begged the question as to whether the plaintiff had a cause of action. In effect, all Encik Muhammad Nadzri Hamzah was saying was that because the plaintiff had not purchased the shares from the brokers, he had no cause of action because a broker has no responsibility whatsoever to ensure that the shares he delivers to his client are genuine shares. But this was the very question which the court had to decide. Encik Muhammad Nadzri Hamzah was not the last word on the subject, and his sweeping statement was nothing more than a bare allegation which raised a question of mixed law and fact which had to be settled at the trial. There was no uncontroverted evidence that the establishment of SCANS or the suspension and delisting of PI extinguished any contractual or tortious liability of the brokers to the plaintiff.

As a consequence of this application, the hearing did not take place on that 2 November. To support his statement of claim, the plaintiff annexed, by way of exhibits to the affidavits he filed in opposition, the contract notes for the shares he purchased, acknowledgements in writing of the second defendant and correspondence he had with MIA. The following observations are pertinent:

(i) each of the contract notes (all of which were on the broker's note paper) carried the share certificate numbers which were delivered by the brokers. These numbers matched the numbers of the certificates set out in the letter of MIA dated 21 July 1989 in which MIA asserted that these unauthorized shares were the subject matter of the public prosecutor's 'statements of facts' in the criminal proceedings in Singapore. MIA also gave the names of the persons registered as the holders of these shares. They were all 'nominees'. In other words, the proper inference here is that the plaintiff could call persons to testify at the trial that the shares were forgeries.

(ii) remembering that PI was suspended on 14 October 1985, the plaintiff produced evidence to show that on 27 November 1985 and again on 20 December 1985, the second defendant Saw had signed a written

A acknowledgement to confirm that the relevant shares had been paid for by cashier's order but that the contract note for the sales listed would be issued when the shares were relisted. There were three such transactions for 25,000 units on 20 December 1985 and four transactions for 23,000 units covered by the admission on 27 November 1985.

B (iii) since PI had been suspended on 14 October 1985, a question arose as to how or why the third defendant arranged to sell 48 lots of PI shares on 12 November and 20 November 1986 and again another 45 lots on 16 May 1986.

C (iv) whereas the plaintiff expressly contracted to buy shares in the Pahang Investment Plc, the share certificates which were delivered by the brokers, their servants and agents to the plaintiff were pieces of paper carrying the name of the Pahang Consolidated Plc.

(v) there were several curious features about these pieces of paper which were passed off as genuine shares of PI viz:

D (a) from a document exhibited at p 189 of the appeal record, the Pahang Consolidated Plc had changed its name to Pahang Investment Plc on 15 October 1984. Many of the share certificates exhibited by the plaintiff were purportedly issued well after 15 October 1984, but still carry the old name.

E (b) all the purported share certificates do not bear the signature of any director or secretary of the company.

(c) they do not bear the account number of the registered shareholders.

(d) they were not printed on security paper.

F (e) to support the plaintiff's contention of fraudulent misrepresentation or negligence, it is evident from his plea of these facts that he was contending that the brokers should have refused to take delivery of these shares because they knew or ought to have known when the 'shares' were handed to them that

G they were not genuine or, at the very least, they had been put on inquiry.

Encik Muhammad Nadzri Hamzah's affidavit had to be considered alongside the defence of the brokers. Briefly, this is what was pleaded therein:

H (i) it was admitted that the two remisiers were their employees;

(ii) the plaintiff was put to proof of all the transactions alleged;

(iii) all the allegations of fraudulent misrepresentation and negligence were denied and it was asserted that the third defendant had no

I responsibility to the plaintiff as pleaded in paras 8–11 of the amended claim;

(iv) it was denied that there was an implied condition in the agreement between the plaintiff and the third defendant that the shares delivered

would be valid shares and the plaintiff was put to proof that the shares sold were invalid and issued unlawfully;

(v) after referring to the suspension of PI on 14 October 1985 and the removal of PI from the list on 29 February 1988 the third defendant (without admitting that any of the transactions were in fact put through them as brokers) asserted that all the plaintiff's transactions had in fact been carried out whilst PI was listed. (Since the contract notes exhibited by the plaintiff clearly shows otherwise, this raised serious doubts about the brokers' credibility);

(vi) the KLSE had set up a subsidiary company SCANS, and all orders to buy or sell through KLSE had to be through SCANS;

(vii) the only responsibility the third defendant had was to transmit orders to the KLSE and the defendant had no way of knowing the identity of the seller where it was acting as the buyer's broker;

(viii) as regards the transactions after 14 October 1984 (which the defendants denied had been put through them), the defendants claimed that they were transactions between the plaintiff as a willing buyer and the willing sellers.

In a nutshell, the plaintiff's case was that he had paid good money to the brokers through their remisiers and he produced the official receipts of the brokers as proof. He also produced the contract notes on the brokers' notepaper and the alleged forged share certificates and the letters of the MIA. His complaint was that the brokers had received shares which they knew or ought to have known were forgeries.

In a nutshell, the defence of the brokers was that they had no responsibility whatsoever to the plaintiff since they were only a conduit pipe for orders between buyer and seller. It must be emphasized here that nowhere in the defence did the brokers assert that the shares they delivered were genuine. They merely denied that they were forgeries and put the plaintiff to proof. Nowhere in the defence or in the affidavits of Encik Muhammad Nadzri Hamzah did the brokers assert that the plaintiff had a remedy against PI under s 63 of the Companies Act 1965.

The learned High Court judge had set out the leading cases on the question as to when the court should exercise its power under O 18 r 19(1) of the Rules of High Court 1980 in his judgment which is now reported in *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691.

At p 701 of the report, there is a reference to *Sykt Soon Theam Sdn v H'ng Chye Jin* [1975] 1 MLJ 259. There was no dispute in that case that the shares bought were genuine Haw Par shares. The issue was whether the defendant had, in fact, placed an order for them. In our case, there was substantial prima facie evidence that the plaintiff had bought and paid for PI shares through the defendants. The issue was whether the brokers had 'completed the order and so rid themselves of the personal liability undertaken by them within the rules of the stock exchange' (to use the words of Chang Min Tat J at p 260).

A It is to be noted that the brokers in our case provided no information whatsoever as to when, where or from whom they acquired the allegedly forged shares which they delivered to the plaintiff. In their defence, they were not prepared to assert that the shares were genuine. Their case was that as brokers, they had no duty whatsoever to ensure that the shares they bought were genuine. Thus, the question as to whether the shares were B genuine or forged was at large, and very much a matter for proof at the trial. Indeed, the refusal of the brokers to take a position on the issue of the genuineness of the shares resulted in the dismissal of their third party proceedings against the KLSE in the sessions court.

For the purposes of striking out under O 14 r 21(a), however, it had C to be assumed that the plaintiff's plea that the shares were forged was a true averment. If they were indeed forged, it is difficult to see how s 63 of the Companies Act 1965 has any application. The section will only come into play if it is first shown that offending shares were issued by the board of directors of PI and those shares were invalid by reason of some provision D of the Companies Act 1965 or other written law or of the memorandum and articles of association of the company. It would be an altogether different proposition if a criminal had, without any authority from the board of PI, duplicated the format of its share certificates and sold these as 'genuine' shares on the open market. With the greatest respect to the High Court judge who concluded his judgment by saying that the plaintiff could E go after Pahang Consolidated and was therefore not without remedy (see p 702 of *Ng Kian Chong*), there was no evidence whatsoever that these 'shares' had in fact been issued by the board of Pahang Consolidated.

Section 63 of our Companies Act 1965 is in identical terms to the Australian s 63 (see *Australian Company Law and Practice* at p 233, where F the conditions precedent to the application of the section are spelt out in p 234).

Ruben & Anor v Great Fingall Consolidated & Ors [1906] AC 439 is an instance where a company was not estopped from disputing the validity of a share certificate forged by the secretary who then purported to issue G it on behalf of the company in return for money advanced. *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 is another instance where it was held that a share certificate sealed without the necessary authority of the board of directors was a forgery, notwithstanding that the signatures were genuine. (See *Palmer's Company Law* (24th Ed, 1987) at p 254). *Dixon v Kennaway & Co* [1900] 1 Ch 833 is yet another authority H on forged certificates where the court held that only in the absence of an effective remedy against the vendor or broker through whose fraud or default the title is bad, can the buyer proceed against the company. (See *Buckley on the Companies Acts* (113th Ed) at p 186). There are other cases on the impact of forged certificates on the liability or the absence thereof I on the part of the company which purportedly issued them [see 9 *English and Empire Digest* (1975 Reissue) at pp 313–315].

In this context, we think that Robert Pennington's comments in his *Company Law* (2nd Ed) at pp 112–113 are not irrelevant. He said:

> The first question to be asked is whether the person who relied on the documents was entitled to assume that the board of directors had authorized its execution. If the document was signed by a director and the only defect alleged is that no proper board meeting was held, the outsider is entitled to make this assumption, and the company cannot contend that the document is a forgery. If, however, the document was not signed by a director but by another person, the outsider must show that the board has held out that person as having authority to sign on behalf of the company, which it may have done by appointing him to a position under the company which in other companies normally carries the power to sign the kind of document in question. The company is then bound by the document because it was signed by a person who had apparent authority to sign it, and the company is estopped from denying his authority. But if signing the document was not within the apparent authority of the person who signed it, the outsider who relies on it cannot treat it as having been signed on the company's behalf, and if it purports on its face to have been so signed, the company can contend that it is a forgery, because it purports to be a different document from what it really is.

In the present case, the plaintiff was effectively contending that the brokers were not entitled to assume that the board of directors of Pahang Investment Plc had authorized the issue of these shares because they did not even carry the signatures of any director or secretary of the company. The seal of the company was not attested. As for the change in name, the point was that the brokers should have been put on alert when they saw that the share certificates were purportedly issued in 1985 in the name of Pahang Consolidated, which was no longer a legal way of describing the company since that name was dropped on the 15 October 1984.

Section 63 of the Companies Act 1965 was not pleaded or even put forward in the sessions court by the brokers' counsel, and he should not have been permitted to raise it on appeal in the High Court. There was not a shred of evidence that these shares had, in fact, been issued by the Pahang Investment Plc. Of course, the onus in the first instance was upon the plaintiff to show why the shares were forgeries but it cannot be said that he did not come up with sufficient material which cried out for an inquiry. The issue of over 32 million forged shares in a company trading on the KLSE may be thought to be a public scandal. Admittedly, after the suspension of PI in October 1985, the chairman of the KLSE was advising the public in April 1988 to await police investigation in April 1988. We are unable to say from the material before us whether, after all these years of waiting, the police investigation was completed and if so, what the outcome was. Nor can we see how it is relevant to civil liability, which must be independently established.

If the shares were indeed forgeries, in the sense that they had been 'issued' without the actual or ostensible authority of the board of director of Pahang Investment Plc, the brokers were liable at common law to refund the price paid and the commission: see *Lamert v Heath* (1846) 153 ER 941 (also at *English & Empire Digest Replacement* Vol 1965 para 54 at p 397). Although the brokers took the plaintiff's money, they are claiming that they had no duty whatsoever to the plaintiff except as a 'conduit pipe'

for the transmission of messages. This is a very sweeping statement and the onus of laying the factual basis for this startling proposition was squarely upon the brokers. At the behest of the brokers' counsel, the judge at the High Court level *assumed* that the Pahang Consolidated shares were 'genuine' when such a finding of fact could only be made at the end of the trial.

Order 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 have no application if the disputed facts once established at the trial will support a cause of action. The importance of first establishing the facts before attempting short cuts has been the subject of cases under O 33. The reasoning applies equally to applications under O 18 and 19. The following statements should help in establishing the correct approach:

(i) If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say 'You must get the facts before we decide the law.' Rather than put the parties to all that expense (and, I may add, delay), I think that we should have the facts ascertained in the trial court before the difficult and important point of law is decided: per Lord Denning MR in *Richards v Naum* [1966] 3 All ER 812 at p 815.

(ii) My Lords, in common with all your Lordships, I agree that this should be treated as the question to be answered. But I hope that your Lordships' agreement so to treat it will not encourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary points should be ordered to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded on pleas of supposed economy: per Lord Roskill in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353 at p 364.

(iii) The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional: per Lord Wilberforce in the case of *Tilling v Whiteman* [1980] AC 1 at pp 17–18.

Encik Karpal Singh also submitted that on grounds of delay alone the application was properly dismissed by the sessions court judge. No proper reasons were given why the brokers made their application so very late especially after lengthy adjournments for months at a time had been given to permit them to file their defence. We agree, but our decision to allow this appeal is based on much firmer ground. The High Court judge very

properly referred to the principles set out in *Wenlock v Moloney & Ors* [1965] 2 All ER 871 at p 874. If he had evaluated the contested facts in their proper perspective, we are in no doubt that he should have upheld the decision of the sessions court judge.

We therefore allowed this appeal and directed that the respondent should pay the costs of this appeal and the costs in the High Court. The order of the sessions court judge dismissing the third defendant's application is reinstated. Accordingly, this case shall go to trial in the sessions court. The appellant's deposit is hereby ordered to be refunded to him.

Order accordingly.

Reported by TA Loh